NO. 88-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

MARY SUE TERRY
Attorney General of Virginia
H. LANE KNEEDLER
Chief Deputy Attorney General
STEPHEN D. ROSENTHAL
Deputy Attorney General
* ROBERT Q. HARRIS
Assistant Attorney General
FRANCIS S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

* Counsel of Record

Appellate Printing Services • Heritage Bldg. •10th & Main • Richmond, VA 23219 •(804) 643-7789

QUESTION PRESENTED

Does the right of "meaningful access to the courts" require the States to provide a personal lawyer to represent each inmate who desires to attack his death sentence in state habeas corpus proceedings?

LIST OF PARTIES

The parties to the proceedings below were the petitioners before this Court, Edward W. Murray, Director of the Virginia Department of Corrections, Gerald L. Baliles, Governor of the Commonwealth of Virginia, Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, and Michael Samberg, Warden of the Virginia State Penitentiary, and the respondents, Joseph M. Giarratano, Johnny Watkins, Jr. and Richard T. Boggs, inmates confined in the Virginia Department of Corrections under sentence of death. Watkins and Boggs are named representatives of a class of death row inmates.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CITATIONS v

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT —

THE CONSTITUTION DOES NOT REQUIRE STATES TO PROVIDE COUNSEL TO REPRESENT INMATES WHO DESIRE TO CHALLENGE DEATH SENTENCES IN STATE HABEAS CORPUS PROCEEDINGS 12

A. The State's Obligation To Provide Counsel Extends To The First Appeal Of Right And No Further 12

B. A Right To Post-Conviction Counsel For Death Row Inmates Is An Unwarranted And Dangerous Intrusion Into A Matter Committed To The Discretion Of The States 15

C. Inmates Under A Sentence Of Death Are Not Entitled To A Preferred Constitutional Status In Post-Conviction Proceedings 18

D. The Right Of Meaningful Access To The Courts Does Not Provide A Right To Counsel For Post-Conviction Proceedings 21

E. Virginia Provides Death Row Inmates Legal Assistance That Exceeds Its Constitutional Obligation To Assure Meaningful Access To The Courts 23

1. The district court's rejection of Virginia's methods of providing legal assistance cannot be properly considered as factual findings based on the record 25

2. The district court erroneously interpreted Virginia law in rejecting the availability of court-appointed counsel 26

3. The district court's "considerations" concerning the ability of death row inmates to make effective use of a law library are not supported by the record 29

4. The district court's "finding" that the assistance the institutional attorneys are able to provide is inadequate is factually flawed and based on an erroneous concept of access to the courts 31

CONCLUSION 32

TABLE OF CITATIONS

Cases

Page

Arey v. Peyton, 209 Va. 370, 164 S.E.2d 691 (1968) 27

Autry v. Estelle, 464 U.S. 1 (1983) 20

Barefoot v. Estelle, 463 U.S. 880 (1983) 10, 14, 19, 20

Bose Corporation v. Consumer Union, 466 U.S. 485 (1984) 26

Bounds v. Smith, 430 U.S. 817 (1977) 3, 10, 21, 22, 23, 24, 31

Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985) 13

Burns v. Ohio, 360 U.S. 252 (1959) 22

Cooper v. Haas, 210 Va. 279, 170 S.E.2d 5 (1969) 27

Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968) 6, 26, 27

Douglas v. California, 372 U.S. 353 (1963) 13

Engle v. Isaac, 456 U.S. 107 (1982) 14

Evitts v. Lucey, 469 U.S. 387 (1985) 13, 15, 16

Ex Parte Hull, 312 U.S. 546 (1941) 21

Fay v. Noia, 372 U.S. 391 (1963) 14

Ford v. Wainwright, 477 U.S. 399 (1986) 20

Griffin v. Illinois, 351 U.S. 12 (1956) 22

Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 313 (1986) 22

Howard v. Warden, 232 Va. 16, 348 S.E.2d 211 (1986) ... 27

Johnson v. Avery, 393 U.S. 483 (1969) 22, 23

Lockett v. Ohio, 438 U.S. 586 (1978) 19

Morris v. Slappy, 461 U.S. 1 (1983) 29

Pennsylvania v. Finley, 107 S.Ct. 1990 (1987) .....
..... 10, 12, 15, 17, 18, 21, 23

Procunier v. Martinez, 416 U.S. 396 (1974) 22, 23

Pulley v. Harris, 465 U.S. 37 (1984) 13, 19

Rhodes v. Chapman, 452 U.S. 337 (1981) 26

Ross v. Moffitt, 417 U.S. 600 (1974) 12, 14, 15, 22, 23

Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974),
cert. denied, sub nom. Parrigan v. Paderick,
419 U.S. 1108 (1975) 14

Smith v. Murray, 477 U.S. 527 (1986) 20

Spaziano v. Florida, 468 U.S. 447 (1984) 19

Strickland v. Washington, 466 U.S. 668 (1984) 15, 20

United States v. Gouveia, 467 U.S. 180 (1984) 30

Virginia Department of Corrections v. Clark,
227 Va. 525, 318 S.E.2d 399 (1984) 27

Wainwright v. Sykes, 433 U.S. 72 (1977) 14, 17

Wainwright v. Torna, 455 U.S. 586 (1982) 12, 15

Wolff v. McDonnell, 418 U.S. 539 (1974) 22, 23

Woodard v. Hutchins, 464 U.S. 377 (1984) 20

Younger v. Gilmore, 404 U.S. 15 (1971) 22

Zant v. Stephens, 462 U.S. 862 (1983) 19

Other Authorities

Code of Virginia -
§ 14.1-183 ..... 6, 27
§ 17-110.1 and 110.2 13
§ 18.2-31 12
§ 19.2-159 6
§ 19.2-264 ..... 12, 13
§ 19.2-326 6
§ 53.1-40 4
§ 53.1-232 29
28 U.S.C. § 2254(b), (c), and (d) 17

No. 88-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the *en banc* Court of Appeals for the Fourth Circuit (Pet. App. A-1-8) is reported at 847 F.2d 1118. The memorandum opinion of the United States District Court for the Eastern District of Virginia (Pet. App. A-23-33) is reported at 668 F.Supp. 511.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for a writ of certiorari was filed on August 31, 1988, and was granted on October 31, 1988.

STATEMENT OF THE CASE

Joseph M. Giarratano, a Virginia prisoner under sentence of death, initiated this civil rights action pursuant to 42 U.S.C. § 1983, by a *pro se* complaint filed in the district court on July 3, 1985. By Order of May 29, 1986, the district court certified a class consisting of:

> all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

(J.A. 32). Thirty-two inmates were confined in Virginia under sentence of death at the time of trial.[1] Only one inmate did not then have counsel. (J.A. 165).

The inmate plaintiffs asserted a constitutional entitlement to representation by counsel in state and federal post-conviction challenges to their convictions and death sentences. They based the asserted right on the Equal Protection and Due Process provisions of the Fourteenth Amendment, the Sixth Amendment, the Eighth Amendment, Article I, and the right of access to the courts.

[1] Fifteen inmates have had death sentences imposed and affirmed on direct appeal since the trial of this action.

The case was tried on July 10 and 11, 1986. By Order and Opinion of December 18, 1986, the district court determined that the inmates were entitled to attorneys upon request to represent them in the preparation, filing, and prosecution of state habeas corpus actions. (Pet. App. A-23). The court based its ruling on the right of meaningful access to the courts as expressed in *Bounds v. Smith*, 430 U.S. 817 (1977). (Pet. App. A-25).

Legal Assistance Available in Virginia

Virginia death row inmates are confined primarily at the Mecklenburg Correctional Center ("Mecklenburg"). On occasion, a few are housed at the Powhatan Correctional Center ("Powhatan") or the Virginia State Penitentiary ("Penitentiary"). Virginia prisoners have access to legal information and assistance from three sources provided by the state: institutional law libraries, institutional attorneys, and court-appointed attorneys.

Institutional Law Libraries:

Each of the institutions housing death-sentenced inmates maintains a law library. (J.A. 336, 341, 347). Regulation of physical access to the libraries varies at the institutions. Mecklenburg death row inmates are permitted two half-day periods weekly (J.A. 265, 322); death row inmates at Powhatan and the Penitentiary are not permitted to visit the libraries, but may have legal material brought to them in their cells. (J.A. 333, 346).

The libraries provide the inmates with court decisions, court rules and state statutes. The libraries also contain copies of the annotated United States Code and federal rules, as well as reported federal cases. Law dictionaries are provided, as are treatises concerning criminal law and procedure, self-help manuals for prisoners, and forms for filing habeas corpus actions. (J.A. 336, 341, 347).

The plaintiffs did not challenge the contents of the institutional law libraries at trial. Inmate Watkins, who had visited the Mecklenburg library "about twice," complained of the lack of

assistance from a clerk. (J.A. 123, 126). Inmate Giarratano also commented on the lack of skills of the library clerk, but he described the library as "decent." (J.A. 207). A library "annex" was created for the death row inmates at Mecklenburg in 1985 to provide additional general reference materials for the prisoners in their cell area. The annex was later removed, at the inmates' request. (J.A. 315, TR. 410).

Institutional Attorneys:

Pursuant to Virginia Code § 53.1-40, attorneys have been appointed for each institution to "counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration." (J.A. 302, 304, 331, 335, 340, 344-45). The appointment and compensation of the institutional attorneys is under the authority of the circuit court where the prison is located. (J.A. 304). The attorneys are independent of the Department of Corrections.

The institutional attorneys are available to assist the inmate in the preparation of habeas corpus petitions by: obtaining the records concerning the trial, including the trial transcript, appellate briefs, and orders; reviewing the record of the trial and other proceedings with the inmate to help identify and develop claims; providing the inmate with copies of legal materials, or conducting legal research for the prisoners; and drafting petitions for the inmate to review and file *pro se*. (J.A. 218-19, 234).

The legal assistance provided by the unit attorneys does not include acting as counsel of record -- the attorneys do not sign the documents as counsel and do not appear in court on behalf of the inmates. (J.A. 219-20, 251). Other attorneys are provided for court proceedings. (J.A. 302).

No requests for legal assistance from the institutional attorneys have been made by death row inmates at the Penitentiary. (J.A. 182, 258). Only one such request was received from a Powhatan death row inmate, and the assistance requested was provided. (J.A. 221, 223-24). None of the institutional attorneys at Mecklenburg, Powhatan, or the Penitentiary has been asked to research and prepare a petition for a writ of habeas corpus

for any death row inmate. (J.A. 182, 221, 230, 231, 232, 258). The institutional attorneys regularly prepare petitions for other inmates when requested to do so. (J.A. 220, 235, TR. 373).

One of the institutional attorneys at Mecklenburg testified that few requests have been made for assistance from the death row inmates. The attorney has conducted legal research upon request (J.A. 235); he has prepared motions for extensions of time (J.A. 232-33); he began work on a certiorari petition for inmate Edmunds before the inmate obtained volunteer counsel (J.A. 237-38); he collected materials for review in preparing a habeas corpus petition for inmate Richard Boggs (J.A. 236-37); he prepared motions to stay mandates (J.A. 249); and he has assisted death row inmates with civil rights actions brought under 42 U.S.C. § 1983 (J.A. 229). The attorney estimated that he had prepared fifty or more habeas corpus petitions for other Mecklenburg inmates since his November 1983 appointment. (J.A. 235).

This attorney collected information concerning capital punishment and the death sentencing process for his library, in addition to the resources available at the institution. (J.A. 238-39). Since 1985, he has monitored the status of the post-conviction litigation of death row inmates at Mecklenburg. (J.A. 228, 233). No death row inmate at Mecklenburg has ever asked the institutional attorney to prepare a petition for a writ of habeas corpus. (J.A. 229-30). The attorney considers himself obligated to prepare such petitions if asked, and he is willing to provide such assistance. (J.A. 231, 236).

Two Mecklenburg inmates testified that the unit attorney had failed to provide assistance upon request. Inmate Watkins asked the attorney to help him obtain a transcript of his trial. At the time of the request, Watkins was represented by counsel on his direct appeal, and he was advised to contact his attorneys to obtain transcript. (J.A. 119, 122-23).

Inmate Giarratano acknowledged that the institutional attorneys come to the death row unit when they receive a request from an inmate. (J.A. 204). Giarratano has referred other inmates to these attorneys, but not specifically for the purpose of preparing a habeas corpus petition. (J.A. 209). Giarratano testified that the unit attorneys had advised him that they could not draft pleadings and could not represent inmates (J.A. 209, 212),

although he was aware of at least one instance when an institutional lawyer prepared a motion for another inmate. (J.A. 210). According to Giarratano, the inmates are aware of the unit attorneys, but their understanding is that the attorneys do not draft petitions and do not represent inmates. (J.A. 212).

The Mecklenburg attorney became aware of the death row inmates' perception that the unit attorneys did not draft petitions during his review of materials submitted in connection with this case. (J.A. 236). His impression was that inmates learn soon after they arrive that the other death row inmates have attorneys who have been privately recruited. The inmates then look to this volunteer system for help in their own cases. (J.A. 235-36).

Representation by Counsel:

Counsel is provided for all indigent defendants accused and convicted of capital crimes in Virginia at trial and on the mandatory direct appeal to the Virginia Supreme Court. Va. Code §§ 19.2-159, 19.2-326. Virginia statutory law does not require the appointment of counsel to represent inmates in the initiation of collateral attacks on state court judgments. Virginia courts have the authority however, to appoint counsel to represent any indigent inmate in a habeas corpus proceeding. Va. Code § 14.1-183. Such appointments are discretionary with the court and have been made, upon request, prior to the filing of any petition. Attorneys so appointed are compensated by the state. As a matter of state practice, the Virginia Supreme Court has ruled that counsel must be appointed to represent a habeas corpus petitioner who presents non-frivolous claims requiring a hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968).

All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state habeas corpus remedies. Each inmate executed in Virginia under the present capital punishment statutes has had counsel available for all habeas corpus actions prior to his execution.

Virginia death row inmates not already represented by volunteer or retained lawyers have sought appointment of counsel on only two occasions. On both occasions, the request for

appointed counsel was granted. (J.A. 325, 353). There is no evidence of a shortage of attorneys willing to accept court appointments.

The Circuit Court of Fairfax County, "on motion of" Richard Whitley, appointed Robert Hall to represent Whitley in the preparation and prosecution of his state habeas corpus action. (J.A. 109, 353). Hall and his associates prepared the petition, conducted the hearing, and prepared the appellate materials. (J.A. 110).

The Circuit Court of York County appointed Alan Clarke and Lloyd Snook to represent death row inmate Willie Leroy Jones. (J.A. 196). The state judge was approached by one of the attorneys who advised the court of his willingness to represent Jones if appointed. The state judge agreed to appoint the attorney, although the formal motion for appointment was tendered and granted after the filing of the petition. (J.A. 325, 328).

Since the enactment of the present Virginia capital punishment statutes in 1976, death row inmates have chosen to rely primarily on volunteer attorneys for assistance in their post-conviction efforts to challenge their convictions and sentences. Beginning in 1983, the Virginia Coalition on Jails and Prisons was formed to monitor the status of Virginia death row inmates and to locate volunteer attorneys willing to represent these inmates in legal proceedings to challenge their sentences after direct appeal. (J.A. 154). Marie Deans, Executive Director of the Coalition, has worked with inmate Joseph Giarratano, and attorneys who had previously represented death row inmates, to recruit lawyers to represent fifteen death row inmates between 1983 and the time of trial. (J.A. 155-56, 157, 159-162). Ms. Deans is not an attorney and the Coalition is not an agency of the Commonwealth.

Ms. Deans experienced increasing difficulty in obtaining volunteer counsel for the inmates. (J.A. 157). She was unable to locate an attorney to file certiorari petitions for one inmate, and the petitions were prepared by inmate Joseph Giarratano. (J.A. 164). She also initially was unable to locate volunteer counsel to prepare a state habeas corpus petition for inmate Earl Washington. Plaintiffs' counsel in this action prepared the petition for Washington. (J.A. 162).

The Decisions Below

The district court concluded that law libraries do not provide these inmates with meaningful access to the courts, citing three considerations: the limited amount of time death row inmates may have to prepare and present their petitions; the complexity and difficulty of the legal work; and the stress on an inmate's mental functions caused by the fact of a death sentence. (Pet. App. A-26). The district court did not question the adequacy of the institutional law libraries in any respect.

The district court also concluded that the assistance provided by unit attorneys is inadequate for these plaintiffs. In part, the district court relied on the limitations imposed by reason of the attorneys' workloads. At the time of trial, seven attorneys provided legal assistance for approximately 2000 inmates. The attorneys appointed to the institutions maintain private practices in addition to their work at the institutions. Testimony at trial indicated that an institutional attorney would find it difficult to handle more than one capital case at a time. (Pet. App. A-27). The district court also concluded that the scope of that assistance was too limited even if additional institutional attorneys were appointed. In particular, the court noted the lack of factual investigation that could be conducted, and the fact that such attorneys do not sign pleadings or appear in court. (Pet. App. A-28).

The district court rejected the availability of court-appointed attorneys as an adequate method of assuring the inmates of access to the courts. According to the district court, the timing of such appointments was too late. The district court interpreted the authority of the Virginia courts to appoint counsel as limited only to situations in which a petition had been filed raising non-frivolous claims. (Pet. App. A-28-29).

The district court ruled that meaningful access to the courts for these inmates could be provided only by "the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights." 668 F. Supp. at 514 (Pet. App. A-28). The pool of attorneys willing to volunteer to represent death row inmates in collateral attacks on their death sentences was determined to be insufficient to meet the needs of

these inmates. The state defendants were ordered to "develop a system whereby attorneys may be appointed to the death row inmates individually." 668 F. Supp. at 517 (Pet. App. A-23). The injunctive relief ordered, however, was limited to *state* post-conviction proceedings.

The defendants appealed to the United States Court of Appeals for the Fourth Circuit, and the plaintiffs cross-appealed. A split panel of the Fourth Circuit reversed the district court's judgment that the state was constitutionally required to provide personal attorneys to represent death row inmates in state collateral proceedings. On rehearing *en banc*, however, the district court's judgment was affirmed by a 6-4 vote. The *en banc* decision, like that of the district court, limited the relief to *state* habeas corpus proceedings and expressly rejected the plaintiffs' contention that their right of access required counsel for federal habeas corpus proceedings as well. 847 F.2d at 1122 (Pet. App. A-8).

SUMMARY OF ARGUMENT

The Fourth Circuit majority has created a right to counsel for the plaintiff inmates where none is required by the Constitution. In reaching this result, the court below disregarded the clear statements of this Court in three distinct areas that recognize the limited reach of the Federal Constitution in post-conviction proceedings affecting state prisoners. In each instance, the court below has ignored or obliterated the lines established by this Court concerning the States' constitutional obligations to prisoners who wish to pursue post-conviction collateral remedies.

1. In *Pennsylvania v. Finley*, this Court found no constitutional right to counsel in post-conviction proceedings, and recognized the limited command of the Constitution in such proceedings. The reasons that this Court identified in *Finley* for limiting the right to counsel to criminal prosecutions and direct appeals are equally evident here. The consequences of a constitutional right to counsel in such proceedings also are readily apparent. This Court has recognized that a constitutionally-mandated right to counsel carries with it a right to effective assistance of counsel. A right to post-conviction counsel will undoubtedly spawn collateral challenges to the effectiveness of habeas counsel.

2. In *Barefoot v. Estelle*, and subsequent cases, this Court has specifically rejected the premise that a post-conviction challenge to a death sentence has a preferred constitutional status. The decision of the court below is nevertheless based on the premise that inmates attacking death sentences are entitled to more consideration in state habeas corpus actions than is required for other prisoners challenging non-capital convictions. This Court, however, has consistently refused to impose additional procedural requirements on the States once a capital case has progressed beyond the trial stage.

3. In *Bounds v. Smith*, this Court articulated a right of access to the courts, but did not require the States to provide the inmate with the equivalent of a personal attorney to represent him in habeas corpus actions, state or federal. The legal assistance which Virginia has made available to these inmates far exceeds the level of assistance which this Court has held sufficient to satisfy the Constitution.

In short, this Court's decisions recognize the important interests of comity and finality intrinsic to all post-conviction actions. Those interests were ignored by the court below, thereby jeopardizing the ability of Virginia to enforce its judgments. The court below has simply preempted the State's legislative prerogative and has substituted its judgment of what it considers a desirable policy in state post-conviction proceedings.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE STATES TO PROVIDE COUNSEL TO REPRESENT INMATES WHO DESIRE TO CHALLENGE DEATH SENTENCES IN STATE HABEAS CORPUS PROCEEDINGS.

A. The State's Obligation to Provide Counsel Extends to the First Appeal of Right and No Further.

The courts below have created a federal constitutional right to counsel for a particular class of inmates for a single type of state-court proceeding. This entitlement requires Virginia to provide counsel if the inmate is indigent and if he expresses a desire to challenge his death sentence in a state habeas corpus action.

This Court has consistently held, however, that the constitutional right to appointed counsel extends to the first appeal of right and no further. *Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974). There is no constitutional right to counsel for state post-conviction attacks on state criminal convictions. *Pennsylvania v. Finley*, 107 S.Ct. 1990, 1993 (1987).

A prisoner seeking to challenge his conviction in a habeas corpus action already has received the full panoply of protections afforded by a legal system that makes individual rights its highest priority. The accused in a criminal prosecution is provided a host of protections designed to ensure fairness and a just result. Fundamental fairness requires counsel as a safeguard of those rights, and Virginia honors these requirements in all criminal prosecutions.

In capital cases, moreover, certain additional substantive and procedural safeguards are provided. Virginia law limits capital murder to a narrowly defined class of eight offenses. Va. Code § 18.2-31. The trial proceedings are bifurcated to permit the appropriate consideration of the separate issues of guilt and punishment. Va. Code § 19.2-264.3. In the sentencing phase, appropriate measures are taken to assure that the sentencer will consider all relevant factors concerning the defendant and his

sentence. Va. Code § 19.2-264.4(B). A defendant is provided a virtually unlimited opportunity to offer evidence in mitigation of punishment. *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985).

Once a defendant has been convicted of capital murder, the Commonwealth's ability to obtain a death sentence is also carefully circumscribed. The prosecutor must prove beyond a reasonable doubt specific aggravating circumstances before a death sentence may be imposed. Va. Code § 19.2-264.4(C). The jurors must be unanimous on the sentence of death, and if they cannot agree, the defendant is automatically sentenced to life imprisonment. Va. Code § 19.2-264.4(D) and (E). Even if the Commonwealth's burden is met, the jury remains free to impose a life sentence, and if it does not, the trial judge still may reduce the penalty to life imprisonment after an independent review. Va. Code § 19.2-264.5. Virginia law thus provides all the safeguards which the Constitution requires for the imposition of a death sentence.

Similarly, when a state provides for an appeal of a criminal conviction, counsel must be provided for the first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963). In Virginia, a mandatory appeal is provided to the Virginia Supreme Court in death penalty cases. The appeal is automatic, unlike the process in non-capital cases, and is given priority over all other appeals. Va. Code §§ 17-110.1 and 110.2. The Virginia Supreme Court is required to conduct an independent review of the sentence to determine if it is excessive, disproportionate, or arbitrarily imposed. Va. Code § 17-110.1(C)(1) and (2). The proportionality review conducted by the Virginia Supreme Court exceeds what the Constitution requires. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (proportionality review not constitutionally mandated in appellate review of capital cases).

Once the direct appeal is over, however, the constitutional obligation of the State to provide counsel ends. By the time the capital defendant has completed his trial and direct appeal, he has received the benefit of the full arsenal of procedural rights, all safeguarded by his right to counsel. Direct appeal is the primary avenue for review of a conviction or sentence. After the process of direct review is complete, state court criminal judgments

are presumed final and valid. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In the context of a capital trial and its heightened procedural safeguards, that presumption is truly earned.

"The writ of habeas corpus indisputably holds an honored position in our jurisprudence," but it also "entails significant costs." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Those costs have been well articulated by this Court. By extending "the ordeal of trial for both society and the accussed," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." *Id.* at 127. *See also* Bator, *Finality in Criminal Litigation and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Isaac*, 456 U.S. at 127.

Habeas corpus is not an occasion to relitigate the state court trial, and its role is secondary and limited. *Barefoot*, 463 U.S. at 887. A habeas corpus action is not part of the criminal adjudication process. *See Fay v. Noia*, 372 U.S. 391, 423-24 (1963).

Virginia courts recognize the appropriate function of the writ of habeas corpus. "A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." *Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974), *cert. denied sub. nom. Parrigan v. Paderick*, 419 U.S. 1108 (1975).

Thus, while state habeas corpus proceedings offer a prisoner an opportunity to challenge his conviction, a State is not independently obligated to provide habeas corpus review to confirm the validity of the state court judgment. The trial is still the "main event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

In *Ross v. Moffitt*, this Court emphasized that there is a significant difference between the role of counsel on appeal and at trial. Appellate counsel no longer acts as the shield to protect the defendant's trial rights. He serves instead as a sword in an attempt to upset a prior determination of guilt. While a state may not dispense with the trial proceedings, the Constitution does not obligate the States to provide any appeal. Having provided an

appeal, the State is not also obligated to provide counsel at every step in the appeals process. *Ross*, 417 U.S. at 610-611.

A habeas corpus proceeding is obviously even further removed from the trial than an appeal. The prisoner's objective is to invalidate a judgment which already has been the subject of direct review and is presumptively valid and final. The additional concern of a need for finality, and the limited function of the writ of habeas corpus, give the considerations articulated in *Ross* even greater force in this arena. As the Court held in *Finley*:

> States have no obligation to provide [habeas corpus] relief,. . . and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

107 S.Ct. at 1994 (citation omitted).

The underlying theory for the inmates' claims in this action is no different than that addressed in *Finley*, *i.e.*, a federal constitutional right to counsel for state post-conviction proceedings. The reasons why the States' obligation to provide counsel extends no further than the first appeal of right, however, are as evident here as they were in *Finley*.

B. A Right To Post-Conviction Counsel For Death Row Inmates Is An Unwarranted And Dangerous Intrusion Into A Matter Committed To The Discretion Of The States.

The consequences of the right which the courts below have created are readily apparent. The attorney who unsuccessfully represents a death row inmate in a post-conviction proceeding, like the attorney who defended the inmate at trial, will become the focus of yet another round of post-conviction challenges. This Court has recognized that the right to counsel, if constitutionally mandated, carries with it the right to effective counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Strickland v. Washington*, 466 U.S. 668, 686 (1984); cf. *Pennyslvania v. Finley*, 107 S.Ct. at 1994.; *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982).

The Fourth Circuit majority's ruling, if allowed to stand, will no doubt provoke an endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney.

> Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to "effective assistance." Provision of the counsel on constitutional grounds also brings with it a panoply of procedural requirements. . . . It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. *The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication -- the trial itself.*

847 F.2d at 1125 (emphasis added) (Wilkinson, J., dissenting and concurring). "The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts v. Lucey*, 469 U.S. at 411 (Rehnquist, J., dissenting).

Virginia's legitimate interest in the finality of its judgments, already threatened by repetitive post-conviction litigation, will be further jeopardized by a finding of a constitutional entitlement to post-conviction counsel. Finality becomes impossible if every post-conviction proceeding produces the opportunity for still more collateral challenges to the adequacy of previous post-conviction counsel. The strong state interest in the enforcement of presumptively valid judgments is reduced to a meaningless phrase without an enforceable concept of finality.

The creation of a right to counsel for death row inmates is also certain to encourage other inmates to assert that they too have difficult and complex claims which require the assistance of counsel. The capital defendant who receives multiple life sentences, for example, is faced with the same type of issues identified by the courts below, but he is not given counsel under the district court and Fourth Circuit opinions. That his need could be as great or greater than that asserted by the class in this case simply demonstrates the arbitrariness of the actions of the courts below.

This unwarranted and unprecedented federal intrusion into a matter peculiarly committed to the States' authority -- state post-conviction review of a state criminal judgment -- "disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence." 847 F.2d at 1123. (Wilkinson, J., dissenting and concurring). This Court has repeatedly stressed the interests of the State in the enforcement of its criminal laws in the context of federal habeas corpus review of state court criminal convictions. The exhaustion requirement of the federal habeas corpus statute, *see* 28 U.S.C. § 2254(b) and (c), the deference to state court factual findings, *see* 28 U.S.C. § 2254(d), and the enforcement of state court procedural rules, *see Wainwright v. Sykes*, 433 U.S. 72 (1977), all reflect an overriding respect in our federal system for the state's interest in its criminal judgments. That interest is certainly paramount to any federal interest which has been identified in this case.

The premise that the *Federal* Constitution dictates the precise form that state post-conviction proceedings should assume has been specifically rejected by this Court: "On the contrary, in this area the States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Finley*, 107 S.Ct. at 1995. The discretion recognized by this Court in *Finley* has little meaning if the State is to be held to some federally-imposed model. The effect of this intrusion, as Judge Wilkinson noted in dissent below, is that "[s]tate post-conviction remedies will now move one step closer to the status of a federal protectorate." 847 F.2d at 1125.

The Fourth Circuit majority and the district court below have created an entitlement to a personal lawyer for death row inmates in state court collateral proceedings, but have not granted such a right for federal habeas corpus actions involving the same inmates challenging the same convictions and sentences. Thus, the lower courts in this case have been willing to thrust upon the Commonwealth of Virginia a system which they are unwilling or unable to force upon the federal government. The remarkable and unprecedented result is that the Federal Constitution is deemed to require greater protection for a state inmate in state court than for the same inmate in federal court.

Even more remarkable is the fact that this new entitlement is

based solely on the preferences of the prisoners, not any demonstrable failure of an existing state system to provide legal assistance. The available sources of legal assistance for death row inmates -- institutional law libraries, institutional attorneys and court-appointed attorneys -- provide ample assurance that each inmate will have an adequate opportunity to identify and present his claims in a petition for habeas corpus relief if he chooses to do so.

Thirty-seven States and the federal government provide for application of the death penalty as a permissible punishment for the most serious crimes. Plaintiffs estimated at trial that two-thirds of the States with capital punishment statutes do not provide lawyers as a matter of right for inmates seeking relief from their sentences in state post-conviction actions. If the decision below requiring the automatic provision of personal counsel to represent each death row inmate in state post-conviction proceedings is permitted to stand, all states which administer a system of capital punishment must expect challenges to their post-conviction procedures on the basis of this newly-found constitutional right to counsel. The second wave of litigation to challenge the *effectiveness* of habeas counsel in capital cases would never end. As the plaintiffs have advised this Court (Br. Opp. 15, 22), the decision of the Fourth Circuit is the *first* to address this issue. If the decision below is upheld, it most certainly will not be the last.

C. Inmates Under A Sentence Of Death Are Not Entitled To A Preferred Constitutional Status In Post-Conviction Proceedings.

Attempting to distinguish *Finley*, the Fourth Circuit majority cited the "significant constitutional difference between the death penalty and lesser punishments," 847 F.2d at 1122 (Pet. App. A-7), and concluded that the nature of the penalty constitutionally requires the appointment of counsel. Thus, the Fourth Circuit has plainly created a special category of habeas corpus cases distinguished only by the nature of the penalty imposed upon the litigant. This Court, however, has specifically rejected

the proposition that the fact of a death sentence entitles a prisoner to a preferred status in post-conviction matters.

A death sentence is not inherently suspect. To the contrary, the many procedural protections constitutionally required for capital trials and sentencing are designed for purposes of assuring a reliable and accurate determination by the sentencer that death is the appropriate penalty in a particular case. A conviction and sentence upheld on direct review is entitled to a presumption of finality and legality, and "*death penalty cases are no exception*". *Barefoot v. Estelle*, 463 U.S. at 887 (emphasis added).

The qualitative difference between death and other punishments has been recognized by this Court as calling for "a greater degree of reliability *when the death sentence is imposed.*" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added) (Burger, C.J.). This concern, grounded in the Eighth Amendment, requires capital sentencing procedures *at trial* designed to minimize the risk that the penalty will be imposed in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). The Court has emphasized its "twin objectives" of "measured, consistent application and fairness to the accused." *Spaziano v. Florida*, 468 U.S. 447, 459 (1984). Thus, the sentencing procedures at trial must provide a means to rationally identify those for whom the penalty is appropriate, *Zant*, 462 U.S. at 878-880, and must permit the sentencer to consider the individual circumstances of the defendant and his crime. *Lockett*, 438 U.S. at 605.

The death penalty, however, does not require special or additional protection for the capital defendant in every matter affecting his trial and sentencing. *See, e.g., Spaziano v. Florida*, 468 U.S. at 460 ("[T]here certainly is nothing in the safeguards necessitated by the Court's recognition of the qualitative differences of the death penalty that *requires* that the sentence be imposed by a jury."); *Pulley v. Harris*, 465 U.S. at 50-51 (rejecting a requirement of comparative proportionality review on state appeals of death sentences).

This Court has considered and repeatedly rejected efforts by death row prisoners to obtain a preferred status in mounting collateral attacks on their convictions and sentences. Neither the "qualitative difference" of the death penalty, nor any constitu-

tional provision, has been deemed to warrant different treatment for capital cases in post-conviction proceedings.

Procedural default rules apply in capital habeas proceedings in the same way as in non-death penalty cases. *Smith v. Murray*, 477 U.S. 527, 538 (1986). Likewise, there is no different standard for post-conviction evaluation of the effective assistance of counsel in death penalty cases. *Strickland v. Washington*, 466 U.S. at 687. In *Barefoot v. Estelle*, 463 U.S. at 893, the Court rejected the provision of an automatic certificate of probable cause to appeal federal habeas cases involving the death penalty.

Five members of this Court joined in a *per curiam* opinion to state emphatically that violations of Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Cases (abuse of the writ) should not be tolerated by the federal courts, even in capital cases. *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (*per curiam*) (Powell, J., concurring). In *Autry v. Estelle*, 464 U.S. 1 (1983) (*per curiam*), the Court refused to adopt a rule that would grant an automatic stay in capital cases "regardless of the merits of the claims presented," even when "the applicant is seeking review of the denial of his first habeas corpus petition." *Id.* at 2.[2]

This Court's decisions demonstrate conclusively that, in the context of a collateral attack, the nature of the penalty does not alter the nature of the proceedings. There is simply no basis in this Court's decisions to support the separate habeas corpus scheme contemplated by the courts below.

[2] In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that execution of an insane person was not permitted by the Eighth Amendment. The Court did not specify what procedures were necessary to make the sanity determination. Five members of the Court, however, explicitly rejected the concept that the strict procedural requirements that surround a capital trial should apply in a post-conviction proceeding. As Justice Powell noted in his concurring opinion, "[T]his Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings . . . do not apply in this context." 477 U.S. at 425.

D. The Right of Meaningful Access to the Courts Does Not Provide a Right To Counsel For Post-Conviction Proceedings.

This case was decided on the basis of the constitutional right of access to the courts. The courts below rejected the means of providing legal assistance to inmates that Virginia has chosen and instead ordered the state to provide the appointment of personal counsel to represent death row inmates upon request. This requirement is not warranted either by law or by the facts of this case.

The Fourth Circuit attempted to avoid the clear import of *Finley* by focusing on the fact that the *Finley* opinion did not expressly refer to *Bounds v. Smith*. In the plainest language, however, the Court acknowledged that Finley had not been denied "meaningful access" as a result of her counsel's conduct. 107 S.Ct. at 1994. In *Ross v. Moffitt*, the Court concluded that "meaningful access" to discretionary appellate review did not require the state to provide counsel. 417 U.S. at 614-15. In *Finley*, the Court explicitly stated that "the same conclusion [as in *Ross*] necessarily obtains with respect to post-conviction review." 107 S.Ct. at 1994.

In *Bounds v. Smith*, this Court addressed the question of "whether states must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge." 430 U.S. at 817. The Court concluded that state prisoners have a constitutional right of access to the courts, and the States have an affirmative obligation to assure that such access is meaningful. The Court specifically held that the obligation of the States is to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

The specific holding in *Bounds* and the historical context of the right of access demonstrate the limited nature of the right.[3] As the Eleventh Circuit observed:

[3] The right of access to the courts was first expressed in *Ex parte Hull*, 312 U.S. 546 (1941), when the Court invalidated a prison regulation prohibiting inmates from filing petitions for writs of habeas corpus without first submitting

> Having held that inmates can represent themselves, if able to do so, and can help other inmates who are not so able, it was but a small step to hold that such able inmates, who presumably would have access to libraries but for imprisonment, must be given access to libraries in prison, or access to people who have access to libraries. This is a far cry from constitutionally requiring the state to provide legal counsel for the imprisoned, not available as a matter of constitutional right to the unimprisoned in civil cases.

Hooks v. Wainwright, 775 F.2d 1433, 1436-37 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 313 (1986) (Florida plan for providing prisoners access does not require attorney assistance).

Bounds did not suggest that the States' obligation to provide legal assistance to inmates included providing a personal lawyer to represent inmates. The appointment of counsel to represent inmates was mentioned only as an independent issue, and by specifically referring to *Ross v. Moffitt* and *Johnson v. Avery*, the Court underscored the conclusion that there is *no* obligation on state and federal courts to appoint counsel for inmates who

---

the pleadings to a state official to determine if they were "properly drawn". The Court held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. at 549. Subsequently, the Court has struck down various restrictions imposed upon prisoners which had the effect of preventing inmates from presenting their claims of constitutional deprivations to the courts. *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial records for inmates who cannot afford to buy them); *Burns v. Ohio*, 360 U.S. 252 (1959) (payment of docket fees by indigent prisoners); *Johnson v. Avery*, 393 U.S. 483 (1969) (regulation prohibiting assistance of other inmates in preparing petitions); *Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam), *aff'g Gilmore v. Lynch*, 319 F.Supp. 105 (N.D.Cal. 1970) (prison regulations restricting inmates' access to libraries); *Procunier v. Martinez*, 416 U.S. 396 (1974) (regulations restricting inmate access to law students); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (regulations restricting assistance of other inmates for civil rights actions). This Court has never construed the "right to meaningful access" to include a right to counsel for post-conviction proceedings.

indicate an intention to seek post-conviction relief.[4] Rather, the right of "meaningful access to the courts" imposes a limited obligation on the States to make some source of legal assistance available to provide inmates a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." 430 U.S. at 825.[5]

The notion that the access right is to be measured against the assistance that might be provided an inmate by a personal lawyer has no support in *Bounds*. Indeed, the idea is entirely inconsistent with the limited nature of the right. The efforts of the courts below to elevate the right of access to the level of a right to counsel ignores the limited scope of the right identified in *Bounds*. By giving the right such an expansive reading, the courts below have granted what this Court specifically denied in *Finley* -a right to counsel for post-conviction proceedings.

E. Virginia Provides Death Row Inmates Legal Assistance That Exceeds Its Constitutional Obligation To Assure Meaningful Access To The Courts.

Virginia has chosen to provide inmates with legal assistance in *both* forms specifically held in *Bounds* to satisfy the State's

---

[4] The Court noted that "[c]ourts may also impose additional burdens before appointing counsel for indigents in civil cases." *Bounds*, 430 U.S. at 826 n.15. That the right of access does not provide a basis for requiring representation by appointed counsel for post-conviction proceedings had been established in *Johnson v. Avery*:

> It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief.

393 U.S. at 488.

[5] This description of the right of meaningful access has been consistently employed by this Court. *See Procunier v. Martinez*, 416 U.S. at 419 ("reasonable opportunity to seek and receive" assistance); *Ross v. Moffitt*, 417 U.S. at 616 ("adequate opportunity to present claims fairly"); *Wolff v. McDonnell*, 418 U.S. at 579 ("opportunity to present").

obligations, *as well as* the opportunity to have counsel appointed to represent the inmate in his habeas corpus efforts. All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state and federal habeas corpus remedies. No inmate has been executed without counsel. Only one of the thirty-two inmates confined in Virginia under sentence of death at the time this case was tried did not then have counsel representing him.[6]

No allegation has been raised in this action that the forms of legal assistance made available by Virginia are inadequate to meet the access rights of the inmate population generally. The district court in fact acknowledged that the Virginia system for providing legal assistance had previously been found adequate to satisfy the state's duty under *Bounds*. 668 F.Supp. at 514 (Pet. App. A-27). The challenge here is based entirely on the premise that inmates under sentence of death require *additional* assistance.

The inmates in this case have attacked the adequacy of a system that they have, with few exceptions, declined to attempt to use. They have chosen to rely primarily on an alternative system of privately recruited volunteer attorneys instead of the assistance available in the Virginia courts and the institutions. The perceived threat of a collapse of that volunteer system led the district court to impose upon Virginia the obligation of providing assistance in the form that the inmates previously had obtained privately. There has been no showing whatsoever that the system Virginia already has in place, if properly utilized by the inmates, is inadequate to meet their needs. The abstract nature of the district court's inquiry is reflected in the speculative nature of the court's determinations.

---

[6] The inmate, Richard Boggs, was being assisted by the institutional attorney in the preparation of a habeas corpus petition. The attorney's efforts to obtain a complete record of the trial proceedings were impeded, in part, by the inmate's reluctance to cooperate fully in that attempt. (J.A. 237). Boggs has since obtained a volunteer attorney.

1. The district court's rejection of Virginia's methods of providing legal assistance cannot be properly considered as factual findings based on the record.

The district court's determination that Virginia does not meet its obligation of providing death row inmates access to the courts is based on generalized policy considerations, not evidentiary findings. The district court made no finding that any inmate was deprived of adequate library time; no finding that any inmate's case was too complex or difficult for him to attempt to raise a particular claim; no finding that any inmate was so preoccupied with his fate that he could not pursue relief on his own; and no finding that any death row inmate was refused assistance from an institutional attorney in preparing his habeas corpus action. As all Virginia death row inmates have in fact been represented by counsel in the preparation of their state habeas corpus actions, the record simply cannot support a determination that any death row inmate was denied access to the courts as a result of an inadequate system of providing legal assistance.

Assuming that the "considerations" selected by the district court have some relevance, they have not been demonstrated to be uniformly applicable to these inmates as a class. The record does not show that these "considerations" apply even to a significant part of the class of Virginia death row inmates. These generalized beliefs are not findings of fact, and the district court did not so label them. In fact, as Judge Wilkinson noted in dissenting below, it is difficult to conceive of how such sweeping generalizations could be made as factual findings given the requirements of the federal rules for class actions. 847 F.2d at 1125 (Pet. App. A-13).

The procedural device of a class action does not warrant transforming generalized statements of policy into factual findings. Nor does the Fourth Circuit's endorsement of the district court's determinations automatically change these "considerations" into particularized findings of fact. There are *no* findings of fact made by the district court which compel deference to the district court's interpretation of what the right of access to the courts requires.

The deference given to a trial court's findings of fact does

not limit a reviewing court's power to correct errors of law, including those that may infect a finding of fact, or mixed questions of law and fact. *Bose Corporation v. Consumer Union*, 466 U.S. 485, 501 (1984). Generalized considerations and beliefs cannot substitute for facts. Absent facts showing a deprivation of a right, the courts should not impose their ideas of what policy considerations suggest as the best response to a perceived problem. *See Rhodes v. Chapman*, 452 U.S. 337, 348-49 (1981).

The district court's errors of law, and its reliance on general considerations rather than the factual record, compel rejection of its conclusions concerning the adequacy of the Virginia system. To the extent that the court's conclusions can be considered factual findings, they are without support in this record and must be deemed clearly erroneous.

2. The district court erroneously interpreted Virginia law in rejecting the availability of court-appointed counsel.

The record in this case establishes that Virginia courts have appointed lawyers for the death row inmates without counsel who have requested such assistance. (J.A. 325, 353). To the extent that an individual death row inmate may have special and difficult claims and lack the ability to present them, he may seek and obtain the appointment of counsel to represent him.

The district court erroneously interpreted Virginia law as authorizing appointment of counsel only after a petition is filed raising non-frivolous claims. In that situation, the assistance was deemed to come too late to satisfy the state's obligation to provide access to the courts. The district court, however, determined an issue that the Virginia Supreme Court has never been called upon to address, and which the lower Virginia courts have decided quite differently than the district court.

The Virginia Supreme Court has held that state courts must appoint counsel for unrepresented inmates in habeas corpus actions where a non-frivolous petition is presented raising triable issues of fact. *Darnell v. Peyton*, 208 Va. 675, 677-78, 160 S.E.2d 749, 751 (1968). The Court has not addressed the question that the district court resolved, but has had the opportunity to consider the issue of appointing counsel only when a petition had in

fact already been filed. *See Howard v. Warden*, 232 Va. 16, 348 S.E.2d 211 (1986); *Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968).

The statutory authority cited by the Court in *Darnell* does not require the prior filing of a petition before the court may appoint counsel. *See* Va. Code § 14.1-183. The district court's conclusion that appointments are made only after a petition is filed and only if a non-frivolous claim is raised, ignores the *uncontradicted* evidence in the record. Virginia courts have in fact provided appointed counsel for death row inmates without requiring them first to file a petition. (J.A. 325, 353).

The only factual circumstance cited by the district court to support its conclusion was one instance in which "the Commonwealth's counsel contended, unsuccessfully, that the Court had no authority to appoint counsel in a habeas corpus proceeding."[7] 668 F.Supp. at 514 n.1 (Pet. App. A-28). However, the authority of a trial court to appoint counsel for a habeas corpus proceeding involving a hearing, as in the instance the court cited, has been clearly established in Virginia since 1968 by *Darnell v. Peyton*.

The plaintiffs have offered the circumstances of inmate Earl Washington as the centerpiece of their argument that Virginia's means of providing legal assistance is inadequate. Washington's case, however, provides no support for their claim.

Washington appeared in the Circuit Court of Culpeper County at a July 3, 1985 proceeding to set an execution date following the denial of his petition for a writ of certiorari in this Court on May 13, 1985. The local prosecutor (the Commonwealth's Attorney) represents the state in these proceedings. Washington was represented by retained counsel. The circuit

---

[7] The court apparently referred to the habeas corpus action of inmate James Clark. The district court described the case as "a matter before the Circuit Court of Clarke County," but no evidence at the trial of this action referred to any proceeding in that court. The attorney who represented Clark testified in this action that he moved for appointment at the end of the habeas corpus hearing in the trial court, and the motion was opposed on the grounds that there was no statutory authority for the appointment. (J.A. 98, 110). The attorney *was* appointed to represent Clark, and that issue was not contested in the *Commonwealth's* appeal of that case. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

court set an execution date for Washington for September 5, 1985. According to the order, Washington's attorney moved the court to appoint counsel to represent Washington "in any habeas corpus proceeding," and the motion was denied. (J.A. 314). The record does not disclose whether Washington's retained attorney asked to have himself or another attorney appointed.

No evidence was presented in this case to explain further the circumstances of the motion or the court's action. No habeas corpus actions had been filed on Washington's behalf at that time. There is no evidence that Washington made any effort to seek assistance available to him at the institution or to seek appointment of counsel himself, and not through his retained counsel. There is no evidence that Washington or anyone acting on his behalf sought a stay of execution to permit the inmate more time to prepare a petition or find counsel.[8]

Virginia has not acted to deny counsel to death row prisoners in habeas corpus actions. There is no evidence that any request for counsel by an *unrepresented* death row inmate has ever been opposed by the Commonwealth or denied by a state court. In fact, the Attorney General's Office has represented its willingness to join in motions for appointment of counsel if a death row prisoner seek this assistance.

Plaintiffs sought to confuse this issue below by noting occasions when the Attorney General's Office or a local Commonwealth's Attorney had objected to motions made by *volunteer* counsel seeking to have themselves appointed by the court. The reaons for those objections are obvious: the prisoner already has an attorney, and asking the court to appoint him infringes on the

[8] Plaintiffs characterize inmate Washington's case as an attempt by Virginia to execute an unrepresented prisoner who was unable to institute state habeas corpus proceedings, and offer it as the example of the "crisis in Virginia." As the record shows, the Attorney General's Office had been advised that a petition would be filed on Washington's behalf. (J.A. 283). The Attorney General's Office was not involved in the Washington case at the sentencing proceeding. In a case where no petition is filed and the prisoner indicates that he wants to file a petition, the Attorney General's Office will join motions to appoint counsel and obtain a stay. (J.A. 271-72, 273, 278, 282). Nothing in this record even remotely suggests that Virginia attempts to execute prisoners who do not have lawyers.

court's discretion to determine whom to appoint. As is also clear, the courts considering such motions decide the issue, not the Attorney General's Office. Some courts have accepted the Attorney General's position and some have not. The result of the denial of such motions is *not* that the inmate is left without counsel. He still has counsel on the same terms that the lawyer accepted when he took the case as a volunteer.

In sum, the record does not establish a lack of authority for court appointed counsel and cannot support an assumption that state court judges are hostile to such appointments. The plaintiffs' indignation at the Commonwealth's objections to the appointment of volunteer counsel reveals the real basis for their dissatisfaction with the assistance Virginia already provides. The inmates want the Commonwealth to pay for the services of volunteer counsel instead of having local courts appoint counsel not of the inmates' own choosing.\The state, however, is not obligated to provide a litigant counsel of his choice at state expense even in the context of the accused in a criminal trial, much less in a collateral proceeding. *See Morris v. Slappy*, 461 U.S. 1 (1983).

3. The district court's "considerations" concerning the ability of death row inmates to make effective use of a law library are not supported by the record.

There may be inmates who cannot effectively use a law library, but there is no evidence that the inmates on Virginia's death row are uniformly disabled from making any effort to research and develop claims using a law library. This lawsuit, for example, was initiated by death-row inmate Joseph Giarratano in a *pro se* complaint. (J.A. 4-7).

Time considerations were not shown to limit the practical ability of an inmate proceeding *pro se* to research and develop his claims.[9] In the context of a state habeas corpus action, the

[9] The district court noted that an execution date may be set as close as thirty days from imposition of sentence. Va. Code § 53.1-232. However, as the district court acknowledged, stays of execution may be granted to permit the inmate additional time to prepare and present his petition to the appropriate courts.

same state court that sets an execution date will be the first state court to consider the petition. There is no basis in the record for concluding that the court would deny an inmate sufficient time to prepare his petition and have it considered. In fact, the *plaintiffs* offered evidence to show that death row inmates remain on death row without lawyers to represent them for "lengthy periods of time." (TR. 192).

There is simply no basis for an across-the-board assumption that all cases involving a death sentence are so inherently complex that no class member can present his claims without a personal attorney to represent him.[10] Nor can it be presumed that an inmate convicted of a non-capital offense is confronted with intrinsically less difficult or complex issues.

The plaintiffs have stressed the need for a factual investigation of the offense and all aspects of the prisoner's background as the primary difficulty encountered in a capital habeas corpus action. The difficulty of conducting factual investigations while incarcerated, however, is not unique to death-sentenced prisoners. All prisoners are similarly disadvantaged in their ability to reinvestigate the facts of their offenses. Presumably, all prisoners could benefit from personal private investigators provided to them by the state to allow an unlimited opportunity to discover and present new facts to challenge convictions. But there is no requirement that such factual investigatory support be provided for the accused *at trial*, much less in a collateral proceeding. What is at issue here is *legal assistance* to assure access to the courts. An attorney is not provided, even at trial, to be a private investigator. *See United States v. Gouveia*, 467 U.S. 180, 191 (1984).

Finally, the district court relied upon a "fair inference that an inmate preparing himself and his family for impending death

[10] The district court stressed the nature of a capital trial, which includes separate guilt and penalty phases, and noted the necessity of analyzing the often voluminous record of such proceedings and the issues of aggravation and mitigation involved. (Pet. App. A-26). Although such a review may be time-consuming, as the district court noted, all inmates of the class certified by the district court have not been shown to be incapable of conducting a review of their cases and raising claims based on such a review. As has been noted moreover, all Virginia death row inmates have had lawyers to conduct such a review.

is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F.Supp. at 513 (Pet. App. A-26). This potential individual circumstance, however, cannot be transformed into an enduring class-wide status that precludes all death row inmates from making any effort to challenge their convictions. Neither inmate who testified suggested any preoccupation with the possibility of an execution.

Thus, the "considerations" relied upon by the district court are either unsupported by the evidence or insufficient to distinguish death row inmates as a class requiring special access assistance. To the extent that the factors cited by the district court may apply to some particular inmate, that prisoner still has available to him the assistance provided at the institution by the institutional attorney and the opportunity to request court appointed counsel to represent him.

4. The district court's "finding" that the assistance the institutional attorneys are able to provide is inadequate is factually flawed and based on an erroneous concept of access to the courts.

As the district court noted, the Virginia system of providing legal assistance by way of institutional attorneys previously had been found sufficient by that court and the Fourth Circuit to meet the state's obligation under *Bounds*. 668 F.Supp. at 514 (Pet. App. A-27).

The district court's assumption that institutional attorneys could not meet the demand of assisting death row inmates is unfounded. The number of attorneys provided, and the hours they devote to their duties, reflect what has been necessary for them to accomplish their tasks. The number of attorneys is not fixed, nor are their hours inflexible. The attorneys indicated their willingness to spend the time necessary to do what is required under their appointments. (J.A. 252-53, 259-60). As the district court acknowledged, additional attorneys may be appointed if the need arises.

More significantly, however, the district court discounted the assistance available from the institutional attorneys for

"*these plaintiffs*" because of its conclusion that "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution." 668 F.Supp. at 514 (Pet. App. A-28). By equating the right of access to the courts with a right to counsel, the district court erred as a matter of law. As is evident from the testimony of the institutional attorneys, they are available to provide the inmates with legal assistance in the filing of post-conviction complaints that includes virtually everything except acting as counsel of record. This is the assistance they have provided to other inmates generally, and this is the assistance they will provide to the death row inmates if requested to do so.

CONCLUSION

The expansion of the right of access to the courts to include a new right to counsel for death-sentenced inmates in state collateral attacks represents a radical departure from existing law and an unprecedented intrusion by federal courts into matters peculiarly the responsibility and concern of the States. By creating a special and preferred status for death row inmates in state habeas corpus proceedings, the courts below have ignored the presumption of finality that attaches to a criminal conviction once a trial and direct appeal have concluded. Capital defendants already benefit from the most careful and meticulous procedural protections devised for any aspect of our legal system. That the protections already afforded are appropriate does not warrant their endless extension in a manner not justified by this record, by this Court's prior decisions, or by a concept of fundamental fairness to death row inmates.

This case is about the drawing of lines. It is about the requirements of a system that meets the demands of fundamental fairness. It is about whether a rationale that "death is different" justifies a special system of post-conviction review in the state courts that is not available to other inmates. The inmate plaintiffs have couched their claim in terms of access to state courts, but realistically, their claim is that fairness in capital cases requires the extension of a constitutionally imposed right to

counsel to state post-conviction proceedings.

This Court already has rejected that argument on a number of occasions. The lines previously drawn are clear, and are clearly inconsistent with the disposition of this case by the courts below. In seeking a reversal of the Court of Appeals, the petitioners ask merely that this Court reaffirm the reconciliation of the values of finality, comity and fairness that this Court previously has recognized.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

* ROBERT Q. HARRIS
Assistant Attorney General

FRANCIS S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

* Counsel of Record

December 1988